Supreme Court of the United States

OCTOBER TERM—1951

No. 188

GEORGE GILLETTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

Report of the Case Below

Since the filing of the petition for certiorari, the opinion of the Court of Appeals herein has been reported (*United States* v. *Gillette,* 189 Fed. (2nd) 449; On re-hearing, id. page 453 *et seq.*).

The respondent's brief leaves unanswered the constitutional and statutory objections to the decision below.

Before referring to the four specific propositions urged by the Solicitor General in answer to the petition, it is important to note that he does not attempt to meet or counter the fundamental objections based on constitutional and statutory grounds which are set forth in the petition and supporting brief and upon which the Court of Appeals reversed the conviction under the ninth count of the indictment. The same basic reasons now urged for reversal, also, of the conviction under the 8th Count (transportation to Chicago) are as follows:

1. The indictment charges and the conviction adjudges the defendant guilty of the interstate transportation of

forged checks from and in the Southern District of New York. That averment and determination were indispensable, by reason of the Sixth Amendment, to authorize the trial in that district. This allegation in the indictment was unproved and was, indeed, disproved by the prosecution's own evidence which showed that when the interstate transportation was first planne dand initiated, the forged checks were already in the Eastern District of New York. This specific objection was pointed out to the trial court by motion (663), and again by exception and request to charge when the trial court had failed to submit the issue involved to the jury, even as one of fact (754, 774).

Because of this defect the Court of Appeals reversed the conviction under the 9th Count, charging transportation from the City, County, State and Southern District of New York to Los Angeles (830). The same defect likewise vitiated the conviction under the 8th Count, charging such interstate transportation from the Southern District of New York, and that Count should, likewise, have been reversed on the same ground, *viz.*, that the variance (besides being otherwise substantial) was rendered material and fatal by the Sixth Amendment. This violation of the express requirement of the Sixth Amendment was emphasized in our petition and brief herein (pp. 2, 6, 8, 21-25), but is ignored in the Solicitor General's brief.

2. The reasoning of the Court below and of the Solicitor General is that the defendant was properly convicted in the Southern District of New York of a crime not committed there, because he became in that district an accessory before the fact to an offense committed elsewhere. This reasoning likewise encounters fundamental objections to which the Solicitor General does not allude.

(a) There is not now and never was in the Federal courts any such crime as that of being an accessory be-

fore the fact. The Solicitor General does not attempt to meet or even refer to the judicial decisions and analysis of the statutes which negative the existence of any such offence (petition, pp. 7, 24). The Solicitor General's statement on page 14 of his brief—"an accessory before the fact," etc. is not supported by any authorities indicating that anyone can be prosecuted on the charge of being an accessory before the fact. Nor can one be convicted of abetting, as an offense distinct and apart from that of committing the crime charged as a principal.

(b) No Grand Jury has charged the defendant with the offense of being an accessory before the fact, even if that offense did exist. Under the Fifth Amendment such an accusation by the Grand Jury would be necessary, even if the felony of being such an accessory had been denounced as a crime by any Federal Statute.

(c) No Federal Statute having declared it a crime to be an accessory before the fact, there is, of course, no punishment provided for that fictional delict. The sentence imposed was based upon the statute referred to in the indictment providing punishment for the offense committed by a principal. The sentence was actually imposed by the trial court pursuant to its mistaken assumption that upon the evidence submitted, the jury could find that offense to have been proved as alleged. The Court of Appeals in affirming the judgment of conviction imposed under the 8th Count has necessarily, in effect, assumed to create a new offense to which it has affixed the same penalty actually provided for the offense charged in the indictment. The result is that the requirements both of the Fifth and Sixth Amendments have been ignored and violated. The Solicitor General has submitted nothing adequate, or even purporting, to meet these basic objections

to that affirmance, but has treated the matter solely as one of an immaterial variance in the pleading, unaffected by constitutional or statutory provisions.

We turn now to the Solicitor General's four specific propositions, all addressed to the question of variance.

The Government's First Proposition

At pages 11 and 12 of Respondent's brief, the learned Solicitor General argues that Petitioner could not possibly have been misled by an indictment which charged transportation from the Southern District of New York, because the thing transported happened to have been manufactured in the Southern District of New York some time before and because a witness testified that on one occasion there was a conversation in the Southern District of New York. We consider that a very large assumption. The allegation as to venue was essential to the jurisdiction of the court. Petitioner went into court to meet that allegation. The government claims now to have proved an offense within the jurisdiction of other courts. None of the cases cited at page 11 of Respondent's brief suggest that this is an immaterial matter. They deal only with immaterial errors in description of acts and things, not venue. The Solicitor General says (Respondent's Brief, p. 11) that petitioner did not (at the trial) claim to be "misled" or "surprised." The case was tried, summed up by both sides and submitted to the jury under the indictment as it stood with no suggestion that any alternative to the facts alleged in the indictment was relied upon by the prosecution. The government's proof of venue was admittedly insufficient. Our "surprise" was occasioned—and still continues—because of the appellate court's holding that the conviction under the eighth count

can be sustained on the theory that the prosecution, although it did not prove what the indictment indispensably alleged, did, nevertheless, prove something else just as bad.

The learned Solicitor General also argues (Respondent's brief, p. 12) that there can be no double jeopardy. He certainly cannot guarantee any such immunity—indeed he does not assume to do so. And it is by no means clear that he is right. One of the tests applied is "whether the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first." (*United States* v. *One Buick Coach Automobile*, 34 Fed. (2d) 318, 321.) Here a second indictment, alleging transportation from the Eastern District, would not, if proved, warrant conviction on this indictment (*Salinger* v. *Loisel*, 265 U. S. 224, 232; Petitioner's main brief, p. 22).

But over and above these questions, we may repeat, is the Sixth Amendment. It is plain. It permits of no interpretation. It is not qualified by any clauses about surprise or double jeopardy. It means exactly what it says, namely, that the accused shall be tried by a jury "of the state and district wherein the *crime* shall have been committed." The crime charged here is interstate *transportation*, and no part of that transportation was in, from or through the Southern District of New York.

The Government's Second Proposition

Respondent's brief (p. 13) points out that the court charged that the only *direct* evidence "connecting Gillette with the alleged conspiracy" is the testimony of Larigan. But the court did not charge that direct evidence is required. The court charged the rule of circumstantial evidence fully (R. 751-752). Nevertheless it is argued,

"This instruction plainly meant that the jury must, in order to convict petitioner on the conspiracy court, believe Larigan's testimony concerning the August 19 meeting" (Respondent's brief, p. 13). That is not what the instruction says. It is not what it meant.

The jury was not told that Petitioner's conviction depended upon believing Larigan. It was told:

> "You have heard all the testimony as to that, as to how he registered at the hotels, as to his meeting with these people, as to his going, as to his comings, as to his associations and those are facts which you, ladies and gentlemen, are to pass upon" (R. 763).

In other words, the jury was permitted to convict on circumstantial proof as well as upon—or apart from—the testimony of Larigan.

That this is so is shown beyond any doubt by the court's further charge about "conspiracy" when the jury came in for additional instruction. This is what the court said:

> "The Court: I think I understand you, gentlemen, before you may find one guilty on a conspiracy count you must find that he was a member of the combination or conspiracy. Now you may find that either from direct testimony of his presence or statements by him or by other parties as to what he had done, *or you may deduce it from the facts.* If one meets with some of the co-defendants in another city and you have no evidence of his taking part in transporting or aiding or abetting in the transportation from New York to that other city, then you would not have substantial evidence of his being a party to the conspiracy. On the other hand, if from all the testimony that is presented to you, *you come to the*

conclusion from the preparations made or from what happened when they met in the other city that he had joined the conspiracy because he was prepared to go forward with the acts and that the acts that he did were done in pursuance of carrying out the terms of the conspiracy, then you may consider all of those facts in that connection. Does that help you?

"The Foreman: Very much, sir." (R. 777-778.) (Italics added.)

In other words, from what was done in Chicago and what was done in Los Angeles the jurors could find that there had been an understanding from the beginning. And it must be remembered that this was said concerning Borda as well as Petitioner, although Larigan had never seen Borda and there was no evidence that Borda had ever been in New York (Petitioner's main brief, p. 20). Likewise, the charge respecting this petitioner made no distinction between the eighth count and the ninth, yet as to the latter, there was admittedly no act or word in the Southern District of New York The Court could not have intended and the jury could not have understood that there was one law for Borda and another for Petitioner, or one probative requirement for the eighth count and a different one for the ninth. It is interesting to note that neither the Court of Appeals nor the Solicitor General made any effort to reconcile the supposed instruction as to Gillette with the plain instruction as to Borda,or to show how the same instructions meant one thing as applied to the eighth count and something different as applied to the ninth. Is it because it cannot be done?

The Solicitor General's reading of the court's charge (as applied to the eighth count only) likewise ignores the general principle which the trial court evidently had

in mind, *viz.*, that acts of abetting and conspiring may be shown by circumstances and need not be specifically pointed out, or fixed at any particular time or place.

> *Nye and Nissen* v. *U. S.*, 336 U. S. 613, 619;
> *Galatas* v. *U. S.*, 80 F. 2d 15, 23;
> *Davis* v. *U. S.*, 107 Fed. 753, 755.

In *Nye and Nissen* v. *U. S., supra,* this Court said (336 U. S. at 619):

> "There is no direct evidence tying Moncharsh to the six false invoices involved in the substantive counts. Yet there is circumstantial evidence wholly adequate to support the finding of the jury that Mancharsh aided and abetted in the commission of those offenses."

In *Galatas* v. *U. S., supra,* the Circuit Court of Appeals for the Eighth Circuit said (80 F. 2d at 23):

> "Overt acts of the parties may properly be considered with other evidence and attending circumstances in determining whether a conspiracy exists and where overt acts are of the character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the acts has a tendency to show such pre-existing conspiracy, so that when proven they may be considered as evidence of the conspiracy charged."

In *Davis* v. *U. S., supra,* the Circuit Court of Appeals for the Sixth Circuit said (107 Fed. at 755):

> "If the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved,

separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt."

The Government's Third Proposition

The learned Solicitor General, like the learned court below, confuses the case by mention of an "accessory before the fact." He overlooks the fact that there is not, never was, such a thing in Federal law (Petitioner's main brief, p. 24). True, one who aids or abets, counsels or advises may be prosecuted by charging that he committed the act itself (Respondent's brief, p. 14) because the statute (18 U. S. C. 2) makes him a principal in the commission of the crime. It does not help, it only confuses more to point out, as the learned Solicitor General does (Respondent's brief, p. 14), that a good indictment directly charges him who counsels and advises with the offense itself without saying that he counseled and advised it. This is because he who counsels and advises does commit, that is, if commission happens. It is not the counseling or advising which is a crime. There is no such offense in federal law as incitement to crime, as there was sometimes at common law (*Commonwealth* v. *Flagg*, 135 Mass. 545, 549). Apart from the conspiracy statute federal law punishes nothing except the act itself, and in this case the act was *interstate transportation*. So it may be substantially true, as the learned Solicitor General says, that when this indictment charged "the substantive offense of interstate transportation of the counterfeits, (it) also charged him with aiding and abetting the transportation" (Respondent's brief, p. 15); neverthe-

less, the "substantive offense" was committed elsewhere than within the jurisdiction of the court.

It only confuses further to say, as the court below did, and as the Solicitor General does (Respondent's brief, p. 16) that at common law an accessory before the fact could be punished where the accessorial facts took place. It is wrong, entirely wrong to say that 18 U. S. C. §2 "establishes the common law offense of accessories before * * * the fact" (Respondent's brief, p. 16). If that were so, then certainly this conviction would fall. The actual transporters were Larigan, Polo and Joseph DiPalermo. Not one of them was convicted, or if any were, it was after this trial. An accessory before the fact cannot be tried until after the principal has been convicted, because, as Blackstone says, "it might so happen that the accessory should be convicted one day and the principal acquitted the next, which would be absurd" (Book IV, p. 323). The government would get into all sorts of trouble if it pressed too far its argument based on the non-existent crime of accessory before the fact.

At page 17 of his brief the learned Solicitor General says there are "Policy considerations behind the requirement that an accused be tried where he committed his illegal acts." But the illegal *act*, as we have seen, was *interstate transportation.* Counselling and advising was not the crime denounced by statute or charged in the indictment. It has never been the law that one should be tried in the place where he stood at any particular time (Petitioner's main brief, p. 25). The Sixth Amendment commands that the trial shall be in the district within which the *crime* was committed. That this is so is well illustrated by *United States* v. *Lombardo,* 241 U. S. 74. Defendant had harbored an alien woman in a house of prostitution in the State of Washington. The statute required him to register that fact with the Commissioner General of Immigration. He did

not do so. His offense, therefore, was not an affirmative act, but an omission. Where was the *situs* of the offense? It was in the District of Columbia where the Commissioner had his office and where the paper should have been filed. Therefore, although it did not appear that defendant had ever been in the District of Columbia or had ever been without the State of Washington this court held that prosecution had to be in the District of Columbia. In accord is *Rumley* v. *McCarthy,* 250 U. S. 283, 289.

For these reasons we contend that this conviction cannot be sustained no matter what the court charged and no matter what the jury necessarily believed, because the Sixth Amendment was violated. Prosecution was in a different district than the one in which the crime was committed.

The Government's Fourth Proposition

The learned Solicitor General tries to excuse Larigan's quotation of DiPalermo's damaging narrative, conclusory statement that "Gillette was backing the deal" on the theory that its purpose "was to encourage Larigan to remain in the conspiracy" since Larigan was "afraid that the wholesale check-passing operations would be unsuccessful" (Respondent's brief, p. 18). This is the Solicitor General's reasoning, not Larigan's. Larigan deserted because he was dissatisfied with his percentage (R. 226). He had no fear of cashing forged checks. He had done that all his life. After he stole the two books entrusted to him he cashed those very checks all over the United States, from New York to California, from Minnesota to Florida (R. 285-289).

It is to be noted that the trial court charged that this statement was not admitted and must not be considered as evidence of guilt (R. 602-3, fols. 1805-6). Nevertheless the

prosecutor in summation referred to it as constituting su
evidence (732)—incidentally misquoting the testimo
(205).

Dated, September 28, 1951.

Respectfully submitted,

VINE H. SMITH
Attorney for Petitione

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Office-Supreme Court,
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CHARLES ELMORE

Supreme Court of the United States

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PETITION FOR REHEARING

VINE H. SMITH,
Attorney for Petitioner.

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No. 188

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

On October 8, 1951, this court, by its order dated on that day, denied the petition herein for certiorari. Pursuant to rule 33 of the rules of this court, the petitioner now applies for a rehearing of his petition for certiorari. Agreeably to the provisions of that rule, the considerations presented herein will be confined to grounds not previously presented and to intervening circumstances of substantial effect. In the latter category attention is called to the decision of the New York Court of Appeals of the State of New York rendered on October 18, 1951, *In the Matter of the Application of John M. Murtagh, Appellant,* etc. A copy of the opinion is annexed to this petition. The grounds which have been developed in the original petition, brief and reply brief, will not be restated except so far as is necessary to introduce the added reasons available to the petitioner for the issuance of the writ.

This application for rehearing will be further limited to the effect of the decision of the Court of Appeals in affirming the conviction under the eighth count of the indictment and will not involve the tenth count which charged conspiracy.

Decision of This Court

Petitioner's counsel interprets the decision of this court denying certiorari as a holding that the matters concerned are not of sufficient general consequence to merit review and determination by the court of last resort. To this element of the case, its importance and the need of such review and determination, the following points are principally addressed.

POINT I

The decision of the Court of Appeals should be reviewed by this Court because it involves an entirely novel interpretation of the Sixth Amendment of the Federal Constitution, in particular the provision thereof which confines jurisdiction in criminal cases to the district—or a district—in which "the crime" is committed.

The Court of Appeals expressly holds and the Solicitor General assumes and the proof shows that the crime charged in the indictment, the only crime defined by any United States statute, involved herein, that of interstate transportation of the spurious checks, was not committed in the Southern District of New York. The decision is, nevertheless, to the effect that that charge could be tried in the Southern District of New York because there is testimony that petitioner was present at a conference in the Southern District at which the transportation of some of the checks to Chicago was planned. Under this decision, if there had been a similar conference in the District of New Orleans, the substantive offense could have been prosecuted there and could have been tried under an indictment alleging the transportation in and from the District of Lou-

isiana in which New Orleans is located. It is submitted that such a decision is of sufficient importance to merit consideration, review and, if necessary, reversal or modification by this court.

If the idea underlying the decision is the (unexpressed) concept that preliminary conduct, such as counseling the offense, is a part of it, that view is, likewise, novel and opposed to the only decisions which we have found directly and specifically concerned with that view.

> *U. S.* v. *Lombardo,* 241 U. S. 74;
> *In the Matter of Murtagh,* New York Court of Appeals, Oct. 18, 1951.

The *Murtagh* case is so recent that the opinion has not as yet been reported, but petitioner's counsel has obtained a copy thereof and the entire opinion is annexed to this petition for re-hearing. A report of the decision has already been published in the New York Times for October 19th, on page 18, column 4, with quoted excerpts from the opinion, which was unanimous.

In each of these cases, the *Lombardo* decision of this court and the *Murtagh* decision of the New York Court of Appeals, the criminal offense was the omission to file a report. In each case, some other act had to be done before the obligation to file the report came into existence and in each case such other indispensable preliminary act was done in a place other than that in which the report had to be filed.

In the *Lombardo* case, the defendant in the Western District of the State of Washington had harbored an alien prostitute. He was required to file a report of such harboring in the Immigration Office at Washington, D. C.

In the *Murtagh* case, the accused, a public officer of the City of New York, had to make an investigation of certain

matters covering all five counties of the City of New York, of which one was the County of Kings. He was also required to file his report of that investigation in the office of the Mayor of the City, which was in New York County.

In each case the accused failed to file the report required. In the *Lombardo* case, the offender, because of that omission, was indicted in the Western District of the State of Washington. In the *Murtagh* case, the attempt was made to prosecute the investigating official in the County of Kings, one of the counties included in the City of New York. In each case the court of last resort held that the crime was committed at the place where the report should have been filed and that the attempt to prosecute in another jurisdictional unit was unauthorized and illegal.

It is submitted that the same principle and reasoning necessarily similarly define "the crime" under the provision of the Sixth Amendment, so that the trial of one accused of crime must be in the district where the crime is committed. In this case, the words "the crime" in that amendment must mean, as was held in the *Lombardo* and *Murtagh* cases, the offense itself, and that offense must be prosecuted in the district where it was committed, and cannot be prosecuted in other districts where acts have been done and words said which are related to—but not part of—the offense itself.

The view which would extend the jurisdiction permitted by the Sixth Amendment to include other districts in which the offense was planned or discussed is likewise opposed to the multitude of decisions distinguishing the substantive crime and the conspiracy to effect its commission as separate offenses.

Conversely, where by statute the counseling itself is the offense, the charge of committing it must be prosecuted and tried in the district where the counsel was given, and

cannot be tried in the district where the act urged was—or was to be—done.

Brothman v. *U. S.*, 191 F. (2nd) 70 (2nd Circ.).

In view of the effort to support the jurisdiction of the Southern District upon the accessory theory, attention is called to

People v. *Wallace*, 78 Cal. App. (2nd) 726, 747-8.

In that case the California Court dealt with a situation partly analogous to this one. In California, as in the Federal jurisdiction, there are no accessories before the fact and all abettors are principals. The Court applying statutory provisions closely similar to those governing the jurisdiction of federal courts, held that the objection of the defendant-appellant Wallace to the jurisdiction of the county in which the fraud charged had been attempted, rejected his claim that he could only be considered an accessory, and held that he was a principal and that the jurisdiction to try him for his participation had been properly assumed by the county where the attempt to consummate the larcenous fraud had been made. The language of the opinion clearly implies disapproval of the claim that he could for any purpose be regarded as an accessory before the fact.

POINT II

The decision of the Court of Appeals introduces an unauthorized, unworkable and confusing rule which is certain to complicate trials in analogous cases.

The Court of Appeals says that the trial judge was in error in not submitting to the jury the specific question as to the effect of the testimony as to what happened in the Southern District of New York. The evidence as to what happened there given by the co-defendant, and confessed forger, Larigan, was to the effect that the petitioner was present in a public restaurant where Turiano and various others discussed the plan to transport some of the spurious checks to Chicago. The only significant statement attributed to petitioner in the discussion was that he would not go to Chicago with the others, but that he wanted to come there later and "supervise." This statement elicited from Larigan after some prodding on direct examination he did not assert on cross-examination, but, on the contrary, repeatedly stated what he said was the entire participation of Gillette, the petitioner, in the conversation without again referring to this remark about supervision.

If the trial judge had submitted to the jury the issue in the form apparently contemplated by the Court of Appeals' opinion, he would have had to direct the jury first to determine how far Larigan's account of what happened in the restaurant was true, and, secondly, whether such participation as they found attributable to petitioner was sufficient to constitute him an accessory. He would have had to charge the jury, further, that the evidence as to the subsequent presence of petitioner in Chicago and in Los

Angeles could not, in itself, be considered evidence of a preconcert between him and the others but only as corroborative of Larigan's testimony as to what happened in the Southern District.

To put it concretely. If the jury found that at this meeting the petitioner had not decided to identify himself with the criminal enterprise, they could not have gone on to consider whether the subsequent events indicated that at some time (other than at the meeting in the restaurant) he had finally concluded to join the others.

The trial judge in the case at bar, of course, had no such filigree of distinction in mind. He believed that there was sufficient evidence to warrant submitting to the jury the charge as presented in the indictment.

Without further elaborating, it is obvious that the holding of the Court of Appeals provides a veritable witches' broth of complication and artificiality, for any judge conscientiously trying to follow the decisions of appellate courts.

It is submitted that this feature of the case also presents ground adequate to justify review by this Court.

POINT III

The holding that a jury's finding of fact that an offense not alleged in the indictment or submitted to the jury may be derived synthetically from the record is itself a violation of the defendant's constitutional right to trial by jury, and an error requiring correction by this Court before it starts spawning the mischief in the administration of justice with which it is manifestly pregnant.

We have already pointed out that, actually, the trial judge called the jury's attention to the fact that the testimony in the case presented both direct and circumstantial evidence and that he left to the jury to find whether the offense alleged in the indictment was committed, on the basis of this entire body of evidence. When, at petitioner's request, the judge charged that the only *direct* evidence as to certain matters was that given by Larigan respecting those matters, he did not alter his general charge that the jury was to reach its verdict on the basis of the entire body of evidence. When he called to their attention that the circumstantial proof might be considered as corroborative of Larigan's direct testimony, he did not alter his previous instruction that the circumstantial evidence itself was a basis for a finding on their part nor did he charge that Larigan's testimony must be believed in order to reach a verdict of conviction.

We are now assuming, however, that we are mistaken and the Solicitor General correct in this reading of the charge and that the jury not only might have but must have interpreted the instructions which they received so as to justify the appellate court's conclusion that they not

only found Larigan truthful but found that the occurrence in the Southern District of New York, which they found to be established by his testimony, showed, without more, the commission of accessorial acts in that District.

Even this large concession is insufficient to warrant the affirmance of the eighth count. The defendant had no opportunity to sum up to the jury on the issue as presented by the evidence of the half hour conference in the public restaurant in Manhattan taken by itself. The issue on which he was required to base his argument was the entire issue as set forth in the indictment and presented by all the evidence.

It is submitted that the point involved here is not one of form but of substance and is, in effect, that counsel for a defendant should be safe in discussing the issues presented by the indictment and submitted to the jury by the court, and should not be required—probably he would not be permitted—to undertake to foresee and to discuss the different issues which an appellate court might in the future assume to unravel, detach and decide.

In this connection it is to be noted that if this decision stands, the judgment as finally recorded in the district court will be to the effect that the petitioner transported spurious checks in and from the Southern District of New York to Chicago, Illinois—although the court has held that he did not.

Respectfully submitted,

VINE H. SMITH,
Attorney for Petitioner.

I certify that the foregoing petition for rehearing is presented in good faith and not for any purpose of delay and that in my opinion said petition is well founded in law.

VINE H. SMITH,
Attorney for Petitioner.

Opinion for Reversal

COURT OF APPEALS

STATE OF NEW YORK.

In the Matter

Of The

Application of JOHN M. MURTAGH, Appellant, for an Order, pursuant to Article 78 of the Civil Practice Act, directed to HON. SAMUEL S. LEIBOWITZ, individually and as a Judge of the County Court of Kings County, presiding as a Magistrate in the County of Kings, City and State of New York, Respondent.

DESMOND, *J.*:

The petition in this proceeding (brought under Article 78, C. P. A.), prayed for an order prohibiting respondent, individually and as a County Judge of Kings County presiding as a magistrate in that county, from continuing to assume jurisdiction over a criminal information filed with respondent against petitioner. Petitioner was, at the times mentioned in that information, a public officer of the City of New York, to wit: its Commissioner of Investigation. The lengthy information filed against appellant, charges the latter with committing, in Kings County, the misdemeanor of neglect of duty (Sections 1841 and 1857, Penal Law) in that it is alleged, he failed to file with the Mayor of the City of New York, as required by law (Section 803, New York City Charter, and New York City Administrative Code, sec. 803-1.0) a report of an investigation, which

the Mayor had ordered appellant to make, and which, according to the information, appellant did make. That investigation, it is stated in the information, was directed toward finding out whether New York City police officers had been lax or inefficient in enforcing the gambling laws, and whether they had taken bribes from gamblers. The information asserts that the investigation by appellant, on the Mayor's order, did disclose such corruption and failure to enforce the gambling laws throughout New York City, including Kings County, but that appellant made no report thereof to the Mayor.

Appellant, in this prohibition proceeding, takes the position that the information charges against him a crime which by its nature can be committed in New York County only, and not in Kings County. It is undisputed that the office of appellant as Commissioner of Investigation and the office of the Mayor are both located in New York County, and so, argues appellant, any report by the Commissioner to the Mayor was required to be made in New York County and any neglect of duty, such as the one alleged in this information, in failing to file such a report with the Mayor, could have occurred only in New York County. Appellant's further contention has to do with Section 134, Code of Criminal Procedure, which reads as follows:

> "When a crime is committed in one county and partly in another.
>
> "When a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting, or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county."

Appellant says that the alleged crime described in this information is not one covered by Section 134, since it was not one which could be committed "partly in one county and partly in another," and since, as he argues, there were no acts or effects "constituting" or "requisite to the consummation of" this particular described offense, which were such as could be held to have occurred in two or more counties.

It seems clear to us that the failure of a City Commissioner to file a report with the Mayor, the offices of both officials being located in New York County, is a fault of omission which cannot be committed elsewhere than in New York County. It follows, therefore (and so the Appellate Division unanimously held), that, without recourse to Section 134, above quoted, there could not be any jurisdiction to deal with this information, in respondent, who is a County Judge elected in and for Kings County only, and qualified to sit as a committing magistrate in that county alone. The majority of the Appellate Division, however, was of the opinion that, within the meaning of section 134, *supra*, the prior act of making the investigation, in Kings County, was an "act requisite to the consummation" of the later offense of failing to file the report thereof in New York County, since, as the Appellate Division *Per Curiam* Opinion puts it: "there could have been no neglect of a duty to report unless the investigation had been made * * *". In effect, the court below, citing *People* v. *Mitchell*, 49 A. D. 531, affd. 168 N. Y. 604, and *People* v. *Hudson Valley Construction Co.*, 217 N. Y. 172, construed section 134, *supra*, to mean that if, in order to convict a defendant, the People must prove not only a criminal act committed in one county, but also an innocent act committed in another, the venue may be laid in either of the counties. We do not so construe or apply section 134.

It was the common law rule that every offense had to be inquired into, as well as tried, in the county where the offense was committed (see authorities collected in *People* v. *Hetenyi*, 277 A. D. 310, 314, affd. 301 N. Y. 757). So stringently was that rule applied, at common law, that where the alleged act was performed in part in one county and in part in another or others, venue was in neither county, and prosecution could not be had at all. To correct that weakness in the law, section 134 was passed in this state, as were its counterparts in other states. But that statute's coverage and purpose are plain from its heading: "*When a crime is committed partly in one county and partly in another.*" It is impossible, we think, to consider a failure to file a paper in a public office as an offense which can be broken up into parts. Under respondent's theory, a state official, ordered by the Governor to investigate certain conditions throughout the whole state, and, doing so but failing to report to the Governor the results of the inquiry, could be indicted in each of the State's sixty-two counties, as if his criminal failure to report had taken place in each of those counties. It seems to us that the crime of neglect of duty can be committed only where the duty is required to be performed, and that place, in this alleged instance, was New York County, the only place where appellant was in duty bound to file the report. We find no cases closely in point in this state or elsewhere, but conclude that such a failure to file is a single act of omission, and is not divisible into several parts.

We turn to respondent's contention that this situation is one of those described in Section 134, *supra*, "where the acts or effects * * * constituting, or requisite to the consummation of the offense, occur in two or more counties * * *". As we have noted, the claimed offense here is a single neglect of duty, consisting of one failure to file one report

with one superior officer. True, there would have been no neglect of that particular sort, had not there been an investigation, report of which appellant was required to make. But, according to the information, appellant did conduct and complete his investigation, so he is charged with no neglect of duty up to that point. His next, and separate, duty, and the one he is said to have neglected, was to make and file a report. His investigation preceded in time that alleged neglect of duty, but the subsequent fault, although *post,* was not *propter,* the early investigation, and so the investigation in Kings County was not an act constituting or requisite to the subsequent omission to report. Stating the same thing in another way, we hold that the lawful investigation was no part of the subsequent crime of neglect of duty, under sections 1841 and 1857, Penal Law.

We do not think either *People* v. *Mitchell, supra,* or *People* v. *Hudson Valley Construction Co., supra,* compels or suggests an affirmance here. Mitchell had been convicted in Erie County on proof that he had committed a larceny as defined in section 528 of the old Penal Code in that he, "having in his possession, custody or control, as a bailee" of property, had appropriated the same to his own use. The only question was to whether the indictment charged a crime committed within Erie County since it alleged that, in that county, he had become a bailee of personal property but had later taken it to Niagara County, and there had feloniously appropriated it. The appellate courts held that Erie County had jurisdiction. We think the distinction between that case and this is that, in the *Mitchell* case, the crime consisted not only of appropriating another's property to the defendant's own use, but of doing that with property which had been entrusted to defendant as bailee, in Erie County. Thus, a

bailment in Erie County was a component of the crime itself, made such by the Legislature, and not merely something which had, preliminarily, to be shown. That fact which had thus been made part of a crime although innocent in itself, had its situs in Erie County, and so Section 134, *supra,* applied. Furthermore as the Appellate Division's opinion in the *Mitchell* case points out (49 A. D. at page 535) the article bailed in Erie County should have been returned in that county.

People v. *Hudson Valley Construction Co., supra,* the other case relied on below, has to do with a crime which, not only in legal theory but in actual fact took place partly in Washington County, where the indictment was found, and partly in Albany County. The alleged offense was obtaining money from the State of New York through fraudulent misrepresentation to State officials of the cost of a State construction job. The indictment alleged the filing in Albany County of the false claims, but as to Washington County it alleged not only the doing of the construction work there, but also the formation in Washington County of a conspiracy to defraud the State, and the furnishing to State inspectors, in Washington County, of false vouchers. Thus, the crime in the *Hudson Valley* case was one made up of several separate fraudulent acts, some of which were done in Albany County and some in Washington County.

Respondent presents several other objections to the granting of a prohibition order here. He says that prohibition is a discretionary remedy and that it does not affirmatively and positively appear that it was here denied as matter of law, and so, as he sees it, we have no power to review what may have been an exercise of discretion. The Appellate Division's majority opinion, however, says that petitioner's application "was properly denied as a matter of law" and so we must conclude that no exercise

of discretion was the basis for its order. Moreover, the other opinion in the Appellate Division tells us that that court was unanimously of the opinion that prohibition should issue, if section 134, *supra,* is not applicable.

Next, respondent urges that prohibition lies only if a body or officer is about to act without or in excess of its or his jurisdiction and that there is, in this instance, power at least to hear and determine the issue of venue. Ordinarily, that would be true, but here it plainly appears that a Kings County Magistrate has assumed to deal with a crime which could not have been committed in Kings County at all. Total lack of jurisdiction is apparent. Finally, respondent says that this prohibition proceeding is premature, since appellant should have first submitted, to respondent, appellant's objection to respondent's taking jurisdiction. The answer to that is that since, on this information, respondent could never have jurisdiction to hold any hearing at all on this alleged crime, there is no reason why appellant should be compelled to submit himself to respondent for any hearing, or ask respondent to determine any issue therein.

The orders should be reversed without costs and the matter remitted to Special Term with instructions to grant the order of prohibition as prayed for in the petition.

* * * * *

Orders reversed, without costs, and the matter remitted to Special Term with instructions to grant the order of prohibition as prayed for in the position.

Opinion by Desmond, *J.* All concur.